

DEFENDER ASSOCIATION OF PHILADELPHIA
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COMMONWEALTH OF PENNSYLVANIA : COURT OF COMMON PLEAS
CRIMINAL TRIAL DIVISION

VS. : CP-51-CR-0000683-2008

MUSTAFA ALI : CHARGE: MURDER, ETC.

MOTION TO BAR COMMONWEALTH FROM PROCEEDING ON CHARGE OF
FIRST DEGREE MURDER BASED ON COMMONWEALTH'S FAILURE TO
PRESERVE MATERIALLY EXCULPATORY EVIDENCE, OR IN THE
ALTERNATIVE TO BAR EVIDENCE THAT CANNOT BE EFFECTIVELY
CHALLENGED DUE TO THE COMMONWEALTH'S FAILURE TO PRESERVE OR
IN THE ALTERNATIVE TO BAR THE DEATH PENALTY

On October 4, 2007, Mustafa Ali approached two Loomis armored car guards who were servicing a Wachovia Bank drive-through money machine at Bustleton and Bleigh Streets in Philadelphia. Mr. Ali had a gun drawn, and in the course of attempting to rob the guards, he killed both of them. One of the guards, Joseph Alullo, also pulled a gun, and fired two shots during the robbery. Almost all of the above was captured by the bank camera. Subsequent investigation revealed that a bullet struck the driver's side window of the armored car that was positioned just outside the scope of the bank camera;

the bullet did not penetrate the window, but the glass was shattered where the bullet struck. Pictures were taken of the shattered glass, but neither the Loomis van nor the window itself was preserved by the Commonwealth. The Commonwealth's failure to preserve this evidence was subsequent to a defense request to examine all physical evidence, and was contrary to its normal procedure. In addition, the defense is prepared to establish that the window would have been materially exculpatory to the crime of First Degree Murder¹. Thus, the Commonwealth's failure to preserve this critical and exculpatory evidence is constitutional error. The remedy, which will be discussed *infra* in greater detail, is that the Commonwealth must be precluded from seeking the death penalty, prevented from seeking a conviction for First Degree Murder, and barred from introducing any evidence suggesting that Defendant shot at the window of the Loomis van.

I. The Commonwealth's failure to preserve the armored car evidence violates Defendant's rights to due process, to present a defense, to effective assistance of counsel, and to a fair trial, pursuant to the Fifth, Sixth, and Fourteenth

¹ Defendant requests his showing that this evidence would have been "materially exculpatory" be done *ex parte*, as it will reveal and explicate Defendant's theory of the case. The United States Supreme Court, under similar circumstances, approved of this procedure as an appropriate way to avoid an improper revealing of work product. Ake v. Oklahoma, 470 U.S. 68 (1985) ("When the defendant is able to make an *ex parte* threshold showing to the trial court that his sanity is likely to be a significant factor in his defense, the need for the assistance of a psychiatrist is readily apparent."). In addition, Pa. R. Crim. P. 573 protects the defense against the forced disclosure of work product, and provides for *in camera* review under appropriate circumstances. The need for an *ex parte* hearing is clear – Defendant has a right to due process and the right to present a defense, and those rights would be in conflict with Defendant's right not to have to reveal his defense theory in pre-trial litigation. The defense will present compelling evidence to this Honorable Court that the failure to preserve the shattered window was materially exculpatory to the critical charge of First Degree Murder.

Amendments to the United States Constitution, and the corollary clauses of the Pennsylvania Constitution.

The guarantees of the Due Process Clause of the Fourteenth Amendment and the corollary clause of the Pennsylvania Constitution require that the Commonwealth disclose all requested evidence to criminal defendants that is “material either to guilt or to punishment,” Brady v. Maryland, 373 U.S. 83, 87 (1963), and all exculpatory evidence that might raise a reasonable doubt as to guilt even if the defense fails to request it. U.S. v. Agurs, 427 U.S. 97, 112 (1976). Disclosure of material evidence is necessary to meet the Fourteenth Amendment’s standard of fundamental fairness and to provide the defendant with a “meaningful opportunity to present a complete defense.” California v. Trombetta, 467 U.S. 479, 485 (1989). This requirement is of the highest importance in a capital case, where the potential sentence of death “calls for a greater degree of reliability.” Lockett v. Ohio, 438 U.S. 586, 604 (1978).

The prosecution’s failure to preserve the evidence of the bullet hole in the armored car violates the rule set out in Brady v. Maryland. To establish a Brady violation, a defendant must show that (1) the evidence at issue is favorable to the defendant; (2) the evidence was material; and (3) the evidence was suppressed by the state, either willfully or inadvertently. Commonwealth v. McGill, 574 Pa. 574, 583 (2003) (citing Strickler v. Greene, 527 U.S. 263, 281-82 (1999)). The evidence in the instant case was suppressed when the Commonwealth failed to preserve it, despite timely requests by the defense for access to it. In addition, failing to seize and impound the Loomis armored car as evidence from the scene of the crime was a departure from normal practice, as described in

Philadelphia Police Department directives and the Pennsylvania Rules of Criminal Procedure, *infra*. Had the defense been able to examine the lost evidence before trial, *as requested*, it would have had compelling evidence to negate the specific intent requisite to a charge of first-degree murder. The Brady factors, listed above and discussed below, clearly establish that the Commonwealth's failure to preserve the armored car evidence violated Defendant's aforementioned state and federal constitutional rights.

A. The armored car evidence is materially exculpatory.

The Commonwealth has a constitutional duty to preserve evidence that is "materially exculpatory." Commonwealth v. Snyder, 599 Pa. 656, 665 (2009). "Evidence is material when there is a reasonable probability, sufficient to undermine confidence in the outcome of the trial, that the result of the proceeding would have been different had the evidence been disclosed." Commonwealth v. Gibson, 597 Pa. 402, 430 (2008)(citations omitted). Under this standard, the Loomis armored car is clearly materially exculpatory evidence. Per Footnote One, the defense is prepared to make a compelling showing of the exculpatory nature of the window evidence *ex parte*.

The prosecution recognizes the importance of this evidence, because it plans to introduce testimony from a Loomis employee who was sitting inside the armored car at the time of the incident, and who will allege that the bullet that hit the car window was the first shot fired, that it was fired by Defendant, and that this shot indicates Mr. Ali's intent to kill all three armored guards. The evidence from the armored car is thus central to the prosecution's argument. Defendant's inability to make use of this evidence to support his opposing version of the facts will deprive him of the opportunity to present a

complete defense and will significantly affect the outcome of the proceeding. The jury's verdict on First Degree Murder may well depend on which account of the incident is accepted, and the destroyed evidence would have played a large role in this determination. The evidence is therefore clearly material to guilt and punishment.

The court in Snyder identifies a key distinction between evidence that is "materially exculpatory," and that which is merely "potentially useful". Commonwealth v. Snyder, 599 Pa. at 672. As the court explained, differentiating between these types of evidence "is a 'treacherous task,' requiring a court to 'divine the import of materials whose contents are unknown and, very often, disputed.'" Snyder, 599 Pa. at 672 (quoting Trombetta, 467 U.S. at 486.) In the context of a capital case, the possibility of the irrevocable punishment of death makes this task all the more perilous and adds extra significance to ensuring that all exculpatory evidence is disclosed. In determining what constitutes materially exculpatory evidence as opposed to potentially useful evidence, the court in Snyder pointed to several factors.

First, the claim that destroyed evidence was exculpatory must be supported by more than a "mere assertion" or pure "speculation and conjecture." Snyder, 599 Pa. at 672. For example, the Snyder court cites Commonwealth v. Small, wherein the defendant claimed that the Commonwealth had not fulfilled its discovery obligations by failing to disclose exculpatory evidence, but made no attempt to identify which evidence had not been disclosed, or that the evidence was material or exculpatory. Commonwealth v. Small, 599 Pa. 423, 441-42 (1999). Again per Footnote One, the defense will make a specific showing of materiality and the exculpatory nature of the unpreserved evidence.

The Snyder court also relied on the definition of potentially useful evidence

provided in Arizona v. Youngblood, 488 U.S. 51, 57 (1989): evidence is potentially useful if “no more could be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.” In Snyder, the evidence at issue consisted of discarded soil samples containing levels of toxins that violated the Solid Waste Management Act. 599 Pa. at 661. The samples had been tested prior to being disposed of, and had shown concentrations of toxins well above the statutory limits. Id. The defense alleged that further testing could possibly have produced different results, which could have exonerated the defendant. 599 Pa. at 672. The court held that this doubtful hypothesis made the evidence only “potentially useful.” Id. In Fisher v. Illinois, 540 U.S. 544 (2004), the court held that evidence of cocaine supporting a possession charge, which the defendant had requested in a discovery motion more than ten years prior to trial and had since been discarded in accord with routine practice, was only potentially useful. 540 U.S. at 548. The evidence at issue was a white powdery substance, and the court explained that “[f]our tests conducted by the Chicago Police Crime Lab and the Illinois State Police Crime Lab confirmed that the bag seized from respondent contained cocaine.” 540 U.S. at 545. Similarly, in California v. Trombetta, *supra*, the destroyed evidence consisted of breath samples that had already been tested to determine the defendants’ blood-alcohol content. 467 U.S. at 482. The defendants argued that the samples should have been preserved to allow for further testing, because it was possible that the results of another test would have yielded different results. Id. In holding that this evidence was only “potentially useful,” the Court explained that “chances are extremely low that preserved samples would have been exculpatory.” Trombetta, 467 U.S. at 489.

Unlike the samples in Snyder, Fisher, and Trombetta, which had undergone reliable tests before being discarded, the armored car window in this case was not subjected to any tests or objective examination before being returned to Loomis and repaired; thus there is no indication that this evidence would have supported the prosecution's theory. Furthermore, even though there was no examination or testing of the armored car window, the Commonwealth plans to put this evidence at the center of the trial by contending that a shot fired at the window indicates Mr. Ali's intention of immediately and intentionally shooting the guards. The prosecution will present this evidence via a single witness's testimony. Other than the witness himself, however, no evidence will be presented to indicate that Defendant shot the window; no examination or testing was done to indicate that this evidence was inculpatory, despite the important role it plays in the prosecution's theory of the case. And, given the Commonwealth's failure to preserve the window, Mr. Ali has now been denied any chance of effectively using this evidence to defend himself.

B. The defendant cannot obtain comparable evidence by reasonably available means.

The Supreme Court held in Trombetta v. California that the loss of exculpatory evidence constitutes a due process violation where the evidence "is of such a nature that the defendant could not obtain 'comparable evidence' by reasonably available means." Trombetta, 467 U.S. at 489 (citation omitted). In Trombetta, the court held that there was comparable evidence available to the defendant - although the original breath samples tested for blood alcohol content were not available, the results of these tests were, and

upon their presentation at trial the defense would be able to challenge the tests in various ways. 467 U.S. at 477-88. In Snyder, the court noted that it was unclear from federal case law whether the existence of comparable evidence was still a factor that should be taken into account in determining whether the loss of evidence constituted a due process violation. 599 Pa. at 673, n. 12. Nevertheless, the court considered this factor and held that the defense did have access to comparable evidence, based on an application of the factors relating to available test results in Trombetta, as well as the existence of other soil sample tests conducted by the defendant. Id.

The Snyder court cited a Sixth Circuit case for its holding that in determining what constitutes comparable evidence under Trombetta, “what matters is that some reasonable alternative means exists for attempting to do what one could have attempted to with the destroyed evidence.” Snyder, 599 Pa. at 673, n. 12. (quoting Elmore v. Foltz, 768 F.2d 773, 778 (6th Cir.1985)). In the case at bar, there is no alternative means for effectively presenting the evidence that could only have come from an examination of the car window. Unlike in Snyder and Trombetta, where results of tests or examinations provided a substitute, there is no evidence of equal strength to be presented at trial in this case. No other evidence could provide the same insight into what happened during the exchange of gunfire between Mr. Ali and the armored guards. Therefore, Defendant cannot obtain evidence comparable to the window of the armored car at the scene of the incident by reasonably available means.

C. The defense specifically requested this evidence and the prosecution failed to provide it.

The prosecution must disclose to the defendant all exculpatory evidence that might raise a reasonable doubt as to guilt, even if the defense fails to request it. Agurs, 427 U.S. at 112. When the defense does in fact request materially exculpatory evidence, as in this case, the failure to provide it is a plain violation of the defendant's due process rights. As the court explained in U.S. v. Agurs,

In Brady the request was specific. It gave the prosecutor notice of exactly what the defense desired. Although there is, of course, no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor, if the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge. When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable. 427 U.S. at 106.

The events at issue in this case occurred on October 4th, 2007. The defense requested the evidence in a letter to the District Attorney's Office dated October 9th, 2007 (Exhibit A), and in a formal discovery motion on July 2, 2008 (Exhibit B). The Commonwealth failed to respond to this request or furnish this evidence to the defense. As the Supreme Court expressed, this conduct is "seldom, if ever, excusable." Id.

The October 9th letter from the defense specifically requested "[a]ll tangible, physical or demonstrative objects or evidence . . . gathered from any source in the course of investigations relating to this case." 10/9/07 Letter, 6. This request clearly encompasses access to all physical evidence from the scene of the crime, including the armored car, which exhibited damage to the driver's side window from gunshots fired during the incident. The letter also specifically requested "[a]ny evidence which would tend to establish a lesser crime than first degree murder, particularly any evidence which

would establish that the killing was unintentional, that there was sudden and intense passion, that there was an unreasonable belief of self defense, that the killing resulted from an act done in a reckless or grossly negligent manner.” 10/9/07 Letter, 9. It is apparent that evidence of where, how, and by whom gunshots were fired, such as that provided by the car window, is relevant to determining the intentions of the parties involved. The Commonwealth’s failure to preserve this evidence despite the timely requests of the defense demonstrates a blatant disregard for the rights of the defendant.

D. The Commonwealth’s failure to preserve this evidence was a clear departure from normal practice, as described in Philadelphia Police Department Directives, and was a violation of the Pennsylvania Rules of Criminal Procedure; this supports a finding of bad faith.

The Philadelphia Police Department Directives require the Commonwealth to recover and preserve objects from the scene of a crime for police investigation, and specifically provide for the seizure and impoundment of vehicles involved in police investigations.² It is common practice to impound vehicles that constitute evidence from

² The Philadelphia Police Department Directives are attached as Exhibit C. Relevant provisions include the following:

The assigned Crime Scene Unit personnel will “[p]rotect, preserve, and recover objects and physical evidence,” prepare property receipts, and “[t]ransport and store evidence” from the scene of a crime. Directive 88-3.

“Property or money which may legally be taken into custody is limited to the following classifications: 2.b. Property received or obtained under circumstances that would normally require a police investigation or property that by its very nature requires investigation.” Directive 91-3.

“Vehicles being confiscated for investigation/evidence will be accepted at the Police Auto Pound . . .” Directive 91-9.

the scene of a crime or other police investigation. The attached letters from the Commonwealth regarding discovery provided to the defense (attached to the end of Exhibit B) indicate that Defendant's vehicle was impounded. Furthermore, Pennsylvania Rule of Criminal Procedure 573(B)(1) defines as mandatory the disclosure, on request by the defendant, of "(a) [a]ny evidence favorable to the accused that is material either to guilt or punishment, and is within the possession or control of the attorney for the Commonwealth;" and, provided they are material, "(f) any tangible objects, including documents, photographs, fingerprints, or other tangible evidence." Pa.R.Crim.P.573(B)(1)(a) and (f). The armored car clearly constitutes tangible evidence that is material and was requested by the defense. Failure to preserve this evidence is thus a violation of the Pennsylvania Rules of Criminal Procedure.

The prosecution may argue that the defense did not request this evidence until after it had been returned to Loomis, and it was therefore not in the possession of the attorney for the Commonwealth. However, the defense moved as quickly as possible to request the evidence, in a letter dated October 9th, 2007, only five days after the incident occurred on October 4th. Moreover, the Commonwealth did not follow its own procedures for seizing and storing evidence for a period of time, including vehicles, that require police investigation. According to Philadelphia Police Department Directives,

"Automotive Services Division (ASD) will receive and store vehicles. . ." Directive 91-11.

"The ECU [Evidence Custodian Unit] will be guided by the following requirements for release of property, excluding firearms, to an owner or agent . . . in the absence of a court order . . . 1. Evidence-requires a memorandum/letter approved by the Chief Inspector of the arresting/investigating unit." Directive 91-17-18.

such evidence should not be released without approval by the Chief Inspector of the Arresting/Investigating Unit. See Directive 91-17-18 (attached as Exhibit C).

While Brady establishes that it is unnecessary to show bad faith on the part of the prosecution when there is a failure to disclose materially exculpatory evidence, 373 U.S. at 87, it is nevertheless significant that the actions of the prosecution in this case are such an obvious departure from normal practice. A showing of bad faith is only necessary when the prosecution fails to disclose evidence that is merely “potentially useful.” Illinois v. Fisher, 540 U.S. 544, 545 (2004). But bad faith can be shown at least in part by a failure to preserve evidence that is “not in accord with their normal practice.” Trombetta, 467 U.S. at 488. When a court finds that the prosecution was acting in accordance with standard procedure, this factor weighs heavily in favor of a finding of good faith. In Fisher, Trombetta, and Youngblood, the Court found that the prosecution acted in accordance with normal practices for dealing with evidence, and not in bad faith.³ In Snyder, the court held that the Department of Environmental Protection was not acting in bad faith when it disposed of samples under a policy that was “if not rigorously formalized or mandated by EPA — at least somewhat regularized.” 599 Pa. at 673. The court addressed the significance of acting in accordance with normal practice, explaining that, “[w]hile it is very unlikely we could find bad faith where samples are destroyed pursuant to standard procedure, evidence destroyed outside a standard procedure is not *ipso facto* destroyed in bad faith.” Id. (citation omitted). Thus, while the fact that the police violated their own directives and the Pennsylvania Rules of Criminal Procedure in not seizing the armored car may not *require* a finding of bad faith, the failure to preserve

³ See Fisher, 540 U.S. at 548; Trombetta, 467 U.S. at 488; and Youngblood, 488 U.S. at 56.

this evidence was such a significant aberration from standard procedure that it would be reasonable for this Court to conclude that the Commonwealth was motivated by animus or by a conscious attempt to suppress the evidence. However, because this was materially exculpatory evidence, the failure to preserve it was a violation of Defendant's due process rights, irrespective of the bad faith of the prosecution.

II. The Commonwealth's failure to preserve the armored car evidence violates the Eighth Amendment and the corollary clause of the Pennsylvania Constitution.

The Eighth Amendment of the United States Constitution, and the corollary clause of the Pennsylvania Constitution, requires "consideration of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death". Commonwealth v. Edmunds, 526 Pa. 374, 388 (1991). The permanence of death makes it inherently different from other forms of punishment, which in turn necessitates different procedures for determining the punishment. Id. at 305. Because of this requirement of individual consideration, the sentencing jury in capital cases must "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers..." to achieve a lesser sentence. Lockett v. Ohio, 438 U.S. 586, 604 (1978).

The prosecution's failure to preserve the armored car for analysis by the defense deprives the defendant of his ability to present all mitigating evidence at sentencing. Even if the jury convicts Defendant of First Degree Murder, and a penalty phase ensues, there is a dramatic difference between the fully premeditated, execution style killing alleged by

the prosecution, and Defendant's explanation that a robbery ended in an unexpected shoot-out. However, without an analysis of the missing evidence, the defense will be unable to effectively present Defendant's version of the facts. The Commonwealth's suppression of this evidence thus violates Defendant's Eighth Amendment right under the U.S. Constitution and its corollary under the Pennsylvania Constitution.

III. To remedy the violation of Defendant's constitutional rights, the Commonwealth should be precluded from seeking a charge of First Degree Murder; additionally and/or alternatively, the Court should bar all testimony regarding shots fired at the armored car window. Finally, because the failure to preserve the exculpatory evidence significantly impairs the defense presentation of mitigation, the Commonwealth should be precluded from seeking the death penalty.

The prosecution's failure to preserve the materially exculpatory evidence of the bullet hole in the armored car window should preclude the Commonwealth from seeking a charge of First Degree Murder based on that evidence. The armored car evidence plays a central role in the prosecution's argument to convict Mr. Ali of First Degree Murder. However, the destroyed evidence, if presented, would have corroborated Defendant's version of the events and negated the specific intent necessary to support a charge of First Degree Murder. This charge should thus be prohibited.

Pennsylvania Rule of Criminal Procedure 573 addresses the remedy for a violation based on the failure to disclose material evidence favorable to the accused. 573(E) provides:

Remedy. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit discovery or inspection, may grant a continuance, or may prohibit such party from introducing evidence not disclosed, other than testimony of the defendant, or it may enter such other order as it deems just under the circumstances.

Pa. R. Crim. P. 573(E)

It is clear that an order for discovery or inspection, as well as the granting of a continuance, are insufficient in this case, when the evidence at issue no longer exists. The most appropriate remedy under the circumstances, based on the prosecution's clear and egregious violation of Defendant's due process rights, as well as the Pennsylvania Rules of Criminal Procedure, is to bar the prosecution from proceeding on a charge of First Degree Murder.

Alternatively, the prosecution should be precluded from introducing any testimony regarding a gunshot at the armored car window. In Commonwealth v. Deans, 530 Pa. 514 (1992), the court held that the prosecution's suppression of evidence constituted a due process violation,⁴ and under the circumstances of the case, the appropriate remedy was the exclusion of testimony regarding this evidence. 530 Pa. at 520. "Due process requires a full opportunity to defend against the charges. Since the defense had no means whatsoever to test the conclusions of the expert, exclusion of his testimony is the only way to insure due process." Id. at 517-18. In the case at hand, Defendant will not be able to present an analysis of the armored car window and will therefore have no effective means of confronting the prosecution's planned testimony

⁴ The Deans standard for evaluating due process violations based on the suppression of material evidence was abrogated by the court in Commonwealth v. Snyder, 599 Pa. 656, 669 (2009); however, the Snyder court made no comment on the remedy applied in Deans, and such remedy for the failure to preserve materially exculpatory evidence must be the same.

about a gunshot fired at the window. Any testimony regarding this evidence should thus be excluded.

Finally, at a minimum, the Commonwealth's failure to preserve the armored car window for analysis by the defense mandates that the Commonwealth be precluded from seeking the death penalty. Although Brady v. Maryland, *supra*, is most often cited in a guilt/innocence context, this Court should take note that Brady itself was a capital case, and that relief was granted for sentencing. In the instant case, the evidence suppressed by the Commonwealth is favorable to Defendant and material to punishment. An analysis of the bullet hole in the armored car window would have constituted mitigating evidence that Defendant is now precluded from presenting. Defendant has no access to comparable evidence by reasonably available means. Although the defense requested access to the armored car window shortly after the incident, the Commonwealth violated its own practice and the Pennsylvania Rules of Criminal Procedure by failing to seize and impound the vehicle at the scene of the crime, which supports a finding of bad faith. The defense requests that the court remedy this violation by prohibiting the Commonwealth from seeking the death penalty.

Respectfully submitted,

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